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in the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-2019

MAILMAN DEVELOPMENT CORPORATION and GAC CORPORATION,

Petitioners,

vs.

CITY OF HOLLYWOOD,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Florida

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

INTRODUCTORY STATEMENT

Respondent, City of Hollywood, a municipal corporation of the State of Florida, prays that the petition for writ of certiorari be denied. In this brief in opposition reference will be made to petitioners' appendix and the symbol "A" with a number designation will be respondent's sole reference to the record below.

JURISDICTION

The jurisdictional requisites are not accepted by the respondent, as will be more fully discussed in respondent's argument. The judgment for which review is sought is not a final judgment under §1257, 28 USCA 144: "*Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court . . .* " (Emphasis Added)

ARGUMENT

A. THERE BEING NO FINAL JUDGMENT — JURISDICTION IS ABSENT

It is submitted that the judgment below lacks the finality requisite to the jurisdiction of the Court. 28 U.S.C. §1257. It is well settled that only final judgments that completely dispose of the subject matter of the litigation and the causes of action may be reviewed. For example, in *Grays Harbor Logging Co. v. Coats-Fordney Co.*, 243 U.S. 251, 37 S.Ct. 295, 61 L.Ed. 702 (1917) a State court judgment that a taking by eminent domain is for public use, where determination and assessment of compensation or change of title has not yet taken place, is not a final

judgment for purpose of certiorari review. See also *Whitus v. Georgia*, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed. 2d 599 (1967); *Arnold v. U. S.*, 263 U.S. 427, 44 S.Ct. 144, 68 L.Ed. 371 (1923).

At bar, four counts of a seven-count complaint were dismissed without leave to amend. (A. 15) There has been no trial and petitioners candidly admit that the remaining counts will be tried later this year. (p. 4, pet. bf.) The order at bar was appealed to the Florida courts pursuant to an interlocutory appeal under Rule 4.2, 32 F.S.A. 244. After trial a decision favorable to petitioners on any of the three counts in the trial court would later moot any decision on the merits of the petition herein.

The necessity for finality in addition to avoiding needless tasks has a sound basis in judicial administration. As pointed out by Justice Frankfurter in *Radio Station WOW, Inc. v. Johnson*, 366 U.S., 120, 132; 65 S.Ct. 1475, 89 L.Ed. 2093, 2097 (1945):

> "Since its establishment, it has been a marked characteristic of the Federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance. . . . This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for Federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the

> decision of a State court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation only after 'the highest court of a State in which a decision in the suit could be had' has rendered a 'final judgment or decree.' Section 237 of the Judicial Code, 28 USCA §344(a), 8 FCA title 28, §344(a). This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our Federal system."

As stated by Justice Harlan in his dissent in *Mercantile National Bank v. Langdeau*, 371 U.S. 555; 83 S.Ct. 520, 9 L.Ed. 2d 523, 535 (1963):

> "Thus this is not a situation in which what remains to be done in the State courts is a mere formality, or in which the appellants concede that their whole case must stand or fall on the federal claim. . . . Here, a victory for appellants on the merits could clearly moot the federal question before us today."

In their challenge of respondent's zoning ordinances, the petitioners have presented a multi-cause attack. Count I alleges that the ordinance is unconstitutional *vel non* (A. 9). Count VI is the traditional challenge that the ordinance is "arbitrary, unreasonable, discriminatory and confiscatory" (A. 10). Count III alleges an equitable estoppel against respondent from enforcing the ordinance against the petitioners. (A. 9)

The relief requested under the causes yet to be tried is clearly alternative to the claim for "inverse condemnation" at bar. It is patent that a final determination after trial that respondent's ordinance is unconstitutional or that respondent is equitably estopped to enforce the ordinance, would render moot the petition *sub judice.*

B. INVERSE CONDEMNATION IS NOT AN AVAILABLE REMEDY

Not only do the petitioners lack a final judgment upon which to invoke the jurisdiction of this court, but they seek relief which is without precedent. They seek to change, *judicially*, what has been the exclusive prerogative of the legislature — the authority to pass zoning and land use controls.

Assuming, but not conceding, that the judgment below has the requisite finality to invoke jurisdiction, certiorari should nonetheless be denied for it is clear that "inverse" or "reverse" condemnation is not an available remedy to the petitioners. The traditional remedies which allege a zoning restriction to be unconstitutional have been pled and will be heard when the trial court gets to the merits. It is the respondent's position that petitioners must look to these remedies for the relief and may not prong the respondent with the spectre of a multi-million dollar eminent domain jury trial.

The police power is the authority for zoning regulations exercised by the State and its municipal subdivisions to promote the public welfare. So essential is the police power that it has been termed one of "the least limitable of the powers of government." 6, *McQuillan, Municipal*

Corporations, §24.03 at 446 (3rd Ed. 1949). The validity of an exercise of the police power depends upon whether it is being used to protect the health, safety, morals or general welfare of the public and whether or not the means employed have a "substantial relation to the public objects which the government may legally accomplish . . ." 6, *McQuillan, supra*, at 572. It is admitted that zoning classifications may have a diminishing effect upon the value of private property, but the governmental protection of private property does not include payment of just compensation.

The dichotomy of the police power and the power of eminent domain was evident and consequently the Florida District Court of Appeal, Fourth District, was quite correct in its refusal to allow a jury trial to award damages to compensate an alleged injury caused by the enactment of a zoning ordinance:

> "We hold that enactment of a zoning ordinance under the exercise of police power does not entitle the property owner to seek compensation for the taking of the property through inverse condemnation." (at A. 3)

In so holding, the district court recognized the distinction between a taking of private property for public use in the exercise of eminent domain, and the regulation of the use of property under the police power. There is a crucial distinction between compelling an owner to furnish a public benefit on the one hand, and restricting his privileges in order to prevent him from imposing a burden upon his neighbors, upon the other.

1, *Nichols on Eminent Domain* (3rd ed.) pp. 69-70, §1.42(2), states:

> "In the exercise of eminent domain property or an easement therein is taken from the owner and applied to public use because the use or enjoyment of such property or easement therein is beneficial to the public. In the exercise of the police power the owner is denied the unrestricted use or enjoyment of his property, or his property is taken from him because his use or enjoyment of such property is injurious to the public welfare."

Freund, The Police Power, Public Policy and Constitutional Rights, 546-547 (1904), states:

> "§511. Difference between police power and eminent domain, and principle of compensation.—The constitutional prohibition against taking property for public use without compensation, applies to injury and destruction as well as to appropriation, and it applies no matter for what purpose the property is taken. If it is recognized that a change of grade entitles to damages, the right cannot be denied on the ground that the change was demanded by considerations of public safety. . . . "
>
> "If we differentiate eminent domain and police power as distinct powers of government, the difference lies neither in the form nor in the purpose of taking, but in the relation which the prop-

> erty affected bears to the danger or evil which is to be provided against.
>
> "Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful, or as Justice Bradley put it, because 'the property itself is the cause of the public detriment.'
>
> "From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle, does not."

This Court has consistently held (albeit too infrequently) the zoning regulations and land use controls are legitimate applications of the police power. *Euclid v. Amber Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Goreib v. Fox*, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228 (1927); *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d (1962).

Most recently the Court in *Village of Belle Terre v. Boraas*, ___ U.S. ___, 94 S.Ct. 234, 39 L.Ed.2d 797 (1974) recognized that application of the police power may have an unrecompensed monetary loss to a landowner:

"A zoning ordinance usually has an impact on the value of the property which it regulates. But in spite of the fact that the precise impact of the ordinance sustained in *Euclid* on a given piece of property was not known, 272 US, at 397, 71 L.Ed. 303, 54 ALR 1016, the Court, considering the matter a controversy in the realm of city planning, sustained the ordinance. Here we are a step closer to the impact of the ordinance on the value of the lessor's property. He has not only lost six tenants and acquired only two in their place; it is obvious that the scale of rental values rides on what we decide today. When *Berman* reached us it was not certain whether an entire tract would be taken or only the buildings on it and a scenic easement. 348 US, at 36, 99 L.Ed. 27. But that did not make the case any the less a controversy in the constitutional sense. When Mr. Justice Holmes said for the Court in *Block v. Hirsh*, 256 US 135, 155, 65 L.Ed. 865, 41 S.Ct. 458, 16 ALR 165, 'property rights may be cut down, and to that extent taken, without pay,' he stated the issue here. As is true in most zoning cases, the precise impact on value may, at the threshold of litigation over validity, not yet be known."

Justice Marshall, while dissenting, agreed:

"I would also agree with the majority that local zoning authorities may properly act in further-

> ance of the objectives asserted to be served by the ordinance at issue here: restricting uncontrolled growth, solving traffic problems, keeping rental costs at a reasonable level, and making the community attractive to families. The police power which provides the justification for zoning is not narrowly confined."

If a governing authority had to pay for its right to limit the use of land, we would find payment being required for setback controls, height limitations, parking regulations, and safety requirements. The result would be bankruptcy or, more probably, no restriction on land use. This is truly a revolutionary concept. As recently stated by the Supreme Court of California:

> "If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land. We indulge in no hyperbole to suggest that if every landowner whose property might be affected at some vague and distant future time by any of these legislatively permissible plans was entitled to bring an action in declaratory relief to obtain a judicial declaration as to the validity and potential effect of the plan upon his land, the courts of this state would be inundated with futile legislation. It is clear, under all the circumstances, that plaintiff has not stated a cause

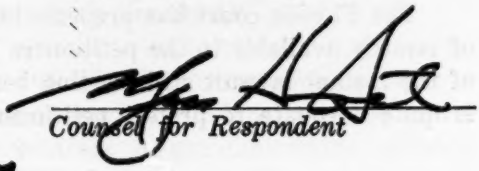
> of action against the county defendants for either declaratory relief or inverse condemnation." *Selby Realty Company v. City of San Buenaventura*, Sup., 109 Cal. Rptr. 700, 805, 806 (1973)

The Florida court has properly held that the arsenal of remedy available to the petitioners in the other counts of the instant lawsuit still pending before the trial court is quite adequate to protect petitioners' rights.

CONCLUSION

For the foregoing reasons, petitioners' application for a writ of certiorari should be denied.

Respectfully submitted,

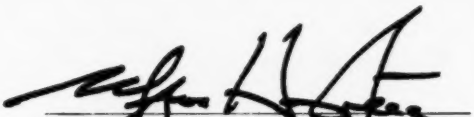


Counsel for Respondent

Dated: August 7th, 1974

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Brief For Respondent in Opposition have been furnished by U.S. Mail prepaid on this 7th day of Aug., 1974 to John R. Lawson, Jr., Post Office Box 1288, 610 Florida Avenue, Tampa, Florida, 33601, Counsel for Petitioners.



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